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In the Supreme Court of the United States

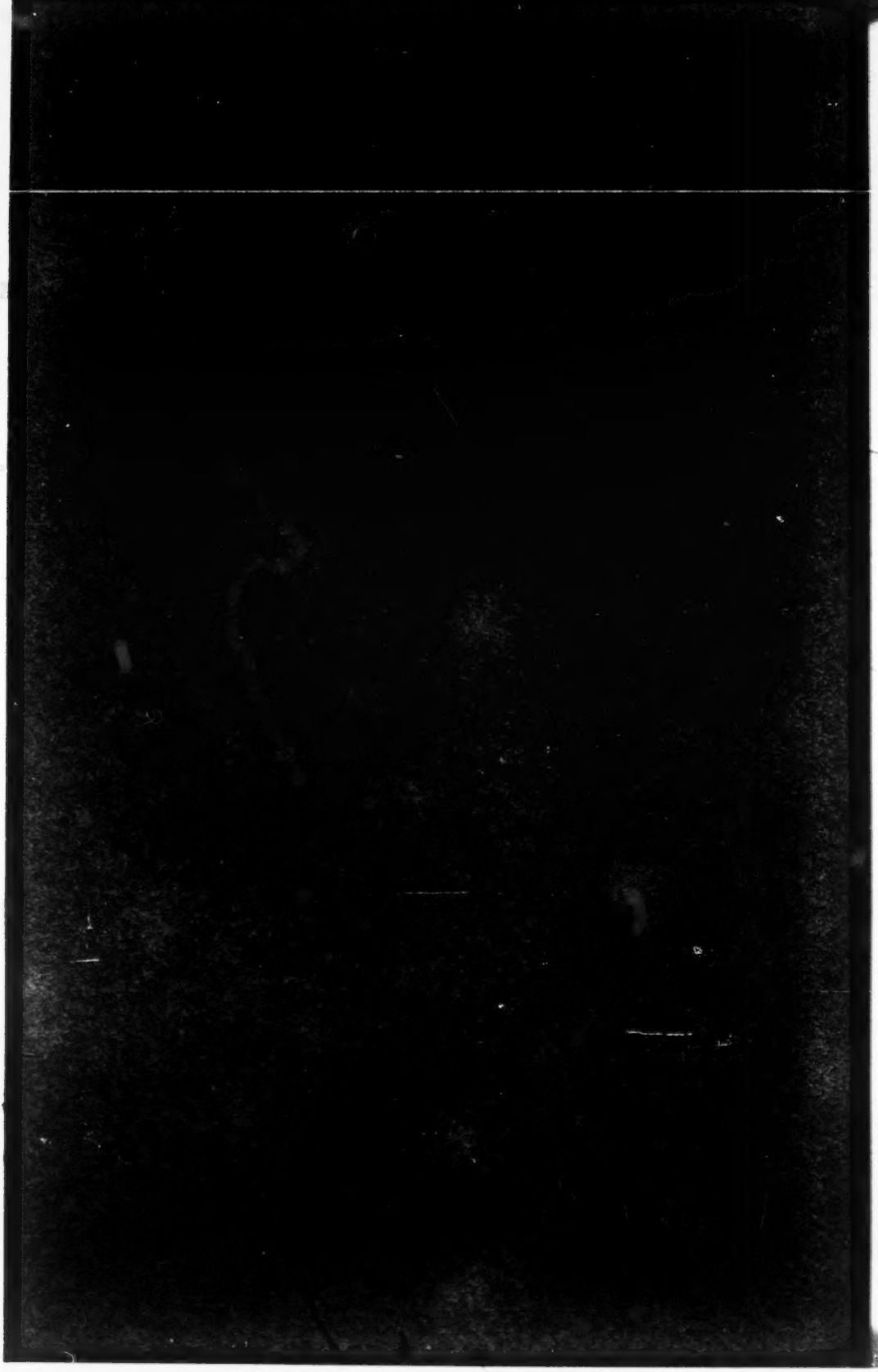
OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY LA FRANCA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF



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PETITION

The Attorney General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on January 7, 1930, reversing the judgment of the District Court of the United States for the Eastern District of Louisiana.

QUESTIONS PRESENTED

1. Whether an action under Section 35, Title II, of the National Prohibition Act, to recover "double taxes," and a penalty alleged to be due because of

criminal acts for which the defendant has been convicted under that Act is barred by Section 5 of the Willis-Campbell Act.

2. Whether a civil proceeding for the recovery of taxes and penalties is barred by a prior conviction of an offense based upon the same acts for which the taxes and penalties are sought to be recovered.

3. Whether Paragraph 9 of Section 701 of the Revenue Act of 1924 is constitutional.

STATUTES INVOLVED

Section 35, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 317 (U. S. C., Title 27, Sec. 52) provides:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500

on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

* * * * *

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3) provides:

That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

* * * * *

Section 701, Paragraph 9, of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327 (U. S. C., Title 26, Sec. 206) provides:

> Every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law, shall pay, in addition to all other taxes, special or otherwise, imposed by existing law or by this Act, $1,000. The payment of the tax imposed by this subdivision shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.
>
> The taxes imposed by this section shall, in the case of persons upon whom a corresponding tax is imposed by section 1001 of the Revenue Act of 1921, be in lieu of such tax.

STATEMENT

Suit was instituted November 9, 1927, by a petition in the District Court to recover from the respondent $2,042.18 in taxes and penalties. The petition alleged in substance that the defendant on specified dates within the period from October 10, 1924, to April 25, 1925, sold intoxicating liquor in a certain restaurant of which he was proprietor to persons named; that by reason of such sales he had become a retail liquor dealer subject to the following taxes for the nine months ending June 30, 1925: Retail liquor dealer's tax, imposed by Section 3244, Revised Statutes, doubled under Section 35, Title II, of the National Prohibition Act, $37.50; a penalty, imposed by Section 3176, Revised Statutes, as amended, for failure to make and file a return on October 10, 1924, $4.68; a special tax imposed by Section 701 of the Revenue Act of 1924 for engaging in the business of a retail liquor dealer in the State of Louisiana contrary to the law of that State, doubled under said Section 35, $1,500; and a penalty imposed by Section 35 upon retail dealers selling intoxicating liquor in violation of the National Prohibition Act, $500. The petition further averred that in case No. 10124 on the docket of that court the defendant had on April 28, 1926, pleaded guilty to the charge of selling liquor. (R. 1–9.)

By plea of former jeopardy, general demurrer, and plea of *res adjudicata*, the defendant sought to have the suit dismissed on the grounds: (1) That

the charges to which he had pleaded guilty in case No. 10124, and upon which there had been a judgment of conviction and a sentence of fine and imprisonment, were identical with and provable by the same evidence as were the charges upon which the taxes and penalties were sought to be recovered, and (2) that the action was barred by Section 5 of the Willis-Campbell Act. (R. 10, 19, 20.) These pleas were overruled. (R. 13–14, 22.) Thereafter an answer and supplemental answer were filed alleging that Paragraph 9 of Section 701 of the Revenue Act of 1924 was unconstitutional in that it imposed a penalty for violation of State law. (R. 22–27.) A jury was waived and a stipulation of facts filed (R. 27–37) substantially the same as those alleged in the petition (R. 30). Judgment was entered upon the facts stipulated for the full sum of the taxes and penalties (R. 45), and a motion for a new trial denied (R. 43, 44).

Except for the claim of unconstitutionality of Section 701 of the Revenue Act of 1924, which was overruled without opinion, the judgment was obviously based upon the reasons given by the court in denying the plea of former jeopardy. (R. 14–18.)

The defendant took the case to the Circuit Court of Appeals, assigning as errors the action of the District Court: (1) In overruling the plea of former jeopardy; (2) in overruling the plea of *res adjudicata;* (3) in not holding that Paragraph 9 of Section 701 of the Revenue Act of 1924 was un-

constitutional; and (4) in denying the motion for a new trial. (R. 47–48.)

The judgment was reversed by the Circuit Court of Appeals upon the sole ground that the suit was barred by Section 5 of the Willis-Campbell Act. (R. 56–59.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the present action to recover double taxes and penalties alleged to be due because of acts for which the defendant had previously been convicted under the National Prohibition Act, is barred by Section 5 of the Willis-Campbell Act.

REASONS FOR GRANTING THE WRIT

A review by this Court of the decision below is of importance in the enforcement of the National Prohibition Act and in the collection of Internal Revenue taxes imposed upon the illicit manufacture, sale, etc., of intoxicating liquor. The reasons advanced to support that decision are not confined to the double taxes and penalties imposed by Section 35, Title II, of the National Prohibition Act, but are sufficiently broad to include the basic taxes under the Internal Revenue laws where their recovery is sought because of acts for which there has been a conviction under the National Prohibition Act. Large sums of money in Internal Revenue taxes and charges, doubled under Section 35, are annually collected from convicted violators of the National Prohibition Act.

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The effect of the decision of the court below is to compel the Government, whenever an act which is a violation of the National Prohibition Act also gives rise to liability for a tax under the Internal Revenue laws, to choose whether it will proceed to collect the tax, or will prosecute the offender. It can not under that decision do both. That this is at variance with the intent of Congress is indicated by the report of the House Judiciary Committee on H. R. 7294, 67th Congress,[1] which later became the Willis-Campbell Act, as well as by the provision of

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[1] In H. Rep. No. 224, 67th Cong., 1st Sess., to accompany H. R. 7294, it was said (p. 3):

"Section 5 has been added to this bill as an amendment to meet a situation created by a decision of the Supreme Court, dated June 1, 1921, in which that court in effect held that the revenue laws applicable to the manufacture, taxation, and traffic in intoxicating liquor for beverage purposes are no longer in force. In the years past it has been deemed necessary to maintain the strictest kind of control over all kinds of liquor to prevent it from being made and sold without the payment of taxes, and there is if anything a greater necessity for such control at this time. There is no practical way of distinguishing between beverage and nonbeverage liquor, and there certainly can be no good reason why the man who makes liquor in violation of law should be dealt with more leniently than the man who makes it for lawful purposes. During the last year the Government collected more than $138,000,000 in revenue from liquor, and there is every reason to believe that the present rate of taxation will be maintained if it is not increased in the next revenue law.

"This section is important for another reason. Section 35 of Title II of the national prohibition act provides for

Section 35, Title II, of the National Prohibition Act, that "This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor." See *United States* v. *One Ford Coupe*, 272 U. S. 321, 326.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals in the above-entitled cause should be granted.

WILLIAM D. MITCHELL,
Attorney General.

APRIL, 1930.

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an additional tax on the illegal manufacture and traffic in liquor over that imposed on liquor lawfully produced and sold. This tax was held to be valid in this decision of the Supreme Court, but decisions have been rendered by various district courts that would indicate that there is no effective remedy for its enforcement. A failure to make suitable provision for the enforcement of these taxes and penalties may mean a loss to the Government of many millions of dollars. There will no doubt be more than $50,000,000 of such taxes assessed before the end of the next fiscal year. The imposition of this tax is one of the most effective remedies against the law violators.

* * * * * * *

"There has been very little opposition to any of the provisions of this bill, and Section 5 is simply seeking to reenact what was believed to be the law at the time the national prohibition act was passed. That act provides, Section 35, Title II, that it shall be construed as an addition to existing laws and that it shall not relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 14) is reported in 26 F. (2d) 706, and that of the Circuit Court of Appeals (R. 56) in 37 F. (2d) 269.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 7, 1930. (R. 59.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTES INVOLVED, ETC.

A statement of the questions presented, statutes involved and assignment of error relied upon, as well as a statement of the case, will be found in the petition.

ARGUMENT

I

THE SUIT IS NOT BARRED BY SECTION 5 OF THE WILLIS-CAMPBELL ACT

It should be noted, in the first place, that the contention that this suit is barred by Section 5 of the Willis-Campbell Act was raised by the general demurrer. (R. 19.) As the overruling of that pleading was not included in the assignment of errors (R. 47–48), it would appear that the Circuit

Court of Appeals reversed the judgment on a ground which was not presented by the record for its decision.

Furthermore we submit that the question was erroneously decided. The provision of Section 5 involved is:

> * * * but if any act is a violation of any of such laws [that is, the prior Internal Revenue laws relating to liquor] and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

Under its plain terms, the foregoing provision applies only where the same act is a "violation" both of the National Prohibition Act or Supplemental Act, and of such antecedent laws, and the bar is against a "prosecution" for "such act or offense" under one of such laws after there has been a conviction therefor under the other. The present suit was brought under Section 35, Title II, of the National Prohibition Act, to recover the double taxes and penalties imposed by that statute because of acts constituting violations of the National Prohibition Act. If, notwithstanding its civil character, the suit be regarded as a "prosecution" for a "violation," within the meaning of Section 5, it is nevertheless (except for the penalty of $4.68 for failure to file a return, imposed by the Internal Revenue laws) a prosecution for a violation of the Act under which the respondent had

been previously convicted, i. e., the National Prohibition Act, and the bar of the statute has, therefore, no application.

The court below sought to bring the case within the bar of Section 5 by the following process of reasoning: (1) The so-called taxes and other charges retained in force by Section 35 of the National Prohibition Act and Section 5 of the Willis-Campbell Act are penalties or fines for criminal misconduct, *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386; (2) a civil suit for the recovery of such a "penalty" may properly be regarded as a "prosecution" for an offense, and (3) the present suit was, therefore, a prosecution which was barred by the statute because the penalties sued for were incurred by reason of acts for which there had been a conviction under the National Prohibition Act.

The chief vice in the foregoing reasoning lies in its second proposition. To have the instant case come within the bar of Section 5, it is not sufficient that it be a prosecution for an offense under either of the two laws; it must be a prosecution for an offense *against the Internal Revenue laws.* There was no attempt in this case to *prosecute* for a *violation* of any of the Internal Revenue laws. The suit was to recover (R. 7–8):

> 1. A special tax as retail liquor dealer under Section 3244, Revised Statutes, doubled under Section 35, Title II, National Prohibition Act.

It was not an offense under Section 3244 to conduct business as a retail liquor dealer. A suit to collect the tax imposed by that section can not, therefore, be regarded as a prosecution for a "violation of any of such laws," within the meaning of Section 5. As to the additional amount resulting from the doubling of the tax, recovery was sought, not under any provision of the Internal Revenue laws, but under Section 35, Title II, of the National Prohibition Act.

> 2. A 25% penalty for failure to make a return as required by Section 3176, Revised Statutes.

A suit to recover such an exaction can hardly be regarded as a criminal prosecution. It is authorized by a provision of Section 3176 empowering the Commissioner of Internal Revenue "to add to the tax 25 per centum of its amount" for failure to file a return within the time prescribed by law.

> 3. A special tax for conducting business as a retail liquor dealer in Louisiana contrary to the laws of that State, imposed under Section 701, Revenue Act of 1924, doubled under Section 35, Title II, National Prohibition Act.

The tax here referred to was authorized by the provision of Paragraph 9, Section 701, of the Revenue Act of 1924, that "Every person carrying on the business of a * * * retail liquor dealer * * * in any State * * * contrary to the laws of such State * * * shall pay, in addition

to all other taxes, special or otherwise, imposed by existing law or by this Act, $1,000." As indicated in the discussion of the first item, *supra,* recovery of the additional amount resulting from the doubling of this tax is not sought under the Internal Revenue laws, but under the National Prohibition Act.

4. A specific penalty for unlawful sales as retail liquor dealer, imposed by Section 35, Title II, National Prohibition Act.

As this penalty was imposed under the National Prohibition Act, the suit for its recovery obviously cannot be regarded as a prosecution for violation of the Internal Revenue laws.

The court treated this case as though it involved only the recovery of penalties under the Internal Revenue laws, and thus put entirely out of view the penalties sought to be recovered under the National Prohibition Act. The reasons given for the court's decision can have no application to the latter.

But finally, even considering the items here involved to be taxes or penalties imposed by the Internal Revenue laws, it could not have been the intent of Congress, in the light of *United States* v. *Yuginovich,* 256 U. S. 450, that a collection under the Internal Revenue laws should bar a criminal prosecution for sale or manufacture under the National Prohibition Act, or *vice versa.*

We submit that the Circuit Court of Appeals erred in holding this action barred by Section 5 of the Willis-Campbell Act.

Although the court below based its decision solely on its construction of Section 5, other questions presented by the assignment of errors are discussed in the following points.

II

THERE IS NO DOUBLE JEOPARDY

Although the respondent assigned as error (R. 47–48) the overruling of his plea of double jeopardy, he failed at the time to except to that action by the court. (R. 13–14.) It would seem, therefore, that this contention is not now available to the respondent. *Rosen* v. *United States* (C. C. A. 2d), 271 Fed. 651, 653; *Feinberg* v. *United States* (C. C. A. 8th), 2 F. (2d) 955, 956–957.

Considering the question on its merits, it should first be noted that in order to establish double jeopardy the subsequent proceeding must be for the same "offense" as that for which the respondent was first placed in jeopardy. *Hebert* v. *Louisiana,* 272 U. S. 312. A single act may be the basis for several offenses. Thus, a conviction for the unlawful sale of liquor will not bar a subsequent prosecution for the unlawful possession of the same liquor. *Albrecht* v. *United States,* 273 U. S. 1. Similarly, a conviction for the sale of cocaine without the vendor being registered will not bar a subsequent prosecution for the sale of the same cocaine without a written order. *Vamvas* v. *United States* (C. C. A. 5th), 13 F. (2d) 347. In the instant case the Government was required to establish not only the unlawful sale of liquor—which alone was neces-

sary for conviction—but also the fact that the respondent was a "retail liquor dealer."

But assuming that the present suit involves the same "offense" as that for which respondent was convicted, Congress may subject any particular offense both to a penalty and a criminal prosecution, and where it is clear that the penalty is intended to be in addition to the criminal prosecution a suit for the recovery of the penalty is not barred by a prior conviction of the defendant of the same offense for which the penalty is alleged to be due. The penalty is merely part of the punishment imposed and it is immaterial that its recovery is sought in a separate action.

The Court of Appeals of New York in *People* v. *Meakim*, 133 N. Y. 214, quoted the statement of the rule in an earlier case as follows (p. 224):

> "It is undoubtedly competent for the legislature to subject any particular offense both to a penalty and a criminal prosecution. It is not punishing the same offense twice. They are but parts of one punishment. They both constitute the punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. It might as well be contended that a man was punished twice when he was both fined and imprisoned, which he may be in most misdemeanors."

See *Stout* v. *State*, 36 Okla. 744; *Haddad* v. *State*, 23 Ariz. 105. See also Bishop on Criminal Law (9th Ed.), Sec. 990 (2).

The same conclusion is reached by the Federal courts. The case of *In re Leszynsky,* Fed. Cas. No. 8,279, involved Section 3318, Revised Statutes, which imposed a penalty of $100, as well as a fine and imprisonment for failure to keep a record of spirits distilled. In holding that a criminal action against the defendant was not barred by a prior civil suit to collect the statutory penalty, Judge Blatchford said (p. 399):

> But, in the eye of the law, the three punishments are only one punishment for the same offence, although the penalty of $100 may be recovered in a civil action, and the fine and imprisonment are inflicted by a criminal prosecution. The statute book has many like provisions for punishment of offences, where a penalty to be recovered by a civil action is given, and a fine and imprisonment, or one of them, on a criminal conviction, is prescribed in addition and cumulatively, by the use of the word "and." Provisions for punishment by the forfeiture of property, which must be enforced in a civil action, and, cumulatively and in addition, by fine and imprisonment, or one of them, on a criminal conviction of the same offence for which the forfeiture of property is prescribed, are of the same character. * * * Penalties and forfeitures given by statute are to be enforced by civil suits. Rev. St. sec. 563, subd. 3; Id. sec. 919. Fine and imprisonment are to be inflicted as the result of a conviction on a criminal prose-

> cution. Different methods are to be resorted to to enforce the different parts of what is one and the same punishment. But, the fact that the two methods may be progressing simultaneously and one be completed before the other, or that one may be fully completed before the other is commenced, cannot have the effect to annul the provision of law in regard to the uncompleted part. * * *

See also *United States* v. *Three Copper Stills,* 47 Fed. 495; *United States* v. *Trobe,* Fed. Cas. No. 16,541.

Section 5 of the Willis-Campbell Act provides:

> All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

Assuming that the taxes and penalties provided by Section 35 are not properly taxes, but penalties or fines for criminal misconduct, nevertheless it seems that the ordinary method of collecting such penalties is by a separate civil suit. R. S., Sections 3213–3215 (U. S. C., Title 26, Sections 142–145); R. S., Sections 563 (3), 919 (U. S. C., Title 28, Section 41 (9), 732). See *Hepner* v. *United States,* 213 U. S. 103. There is no reason why the institution of such a civil proceeding should defeat the legislative intent that the remainder of the statutory punishment be also imposed. There is no

requirement in the double jeopardy provision of the Fifth Amendment that the entire punishment meted out to a defendant for the commission of an offense be determined in one judicial proceeding. This Court and other courts have held that although a defendant has been tried and convicted of an offense he may thereafter be brought into court and upon proof of an earlier conviction be sentenced to additional or increased imprisonment. *Graham* v. *West Virginia,* 224 U. S. 616; *State* v. *Zywicki,* 175 Minn. 508.

In the instant case it is manifest that Congress intended the criminal provisions of the National Prohibition Act and the tax or penalty provisions to be cumulative and not alternative. This intention is emphasized by the subsequent enactment of the Willis-Campbell Act specifically continuing in force all nonconflicting revenue statutes. At no place in the Act or the Supplemental Act is it suggested that the Government must elect to sue either for the tax and penalties or proceed criminally. Section 35 of the Act specifically provides that the payment of the taxes and penalties therein provided shall not "relieve anyone from criminal liability." This is an explicit statement of intention.

The following decisions support the contention above advanced: *United States* v. *Mt. Clemens Beverage Co.* (E. D. Mich.), 23 F. (2d) 885; *United States* v. *Bullinger* (E. D. N. Y.), 290 Fed. 395.

The cases relied upon by the respondent in the court below to sustain the contention of double

jeopardy are mostly cases (1) where it was not clear that the statutory penalties were intended to be cumulative (*United States* v. *Gates*, Fed. Cas. No. 15,191; *United States* v. *McKee*, Fed. Cas. No. 15,688), or (2) cases holding that where an issue as to the existence of an act or fact has been tried in a criminal prosecution a judgment of *acquittal* is conclusive in a later suit *in rem*, as a cause for forfeiture of the defendant's property, where as against the defendant the existence of the same act or fact is in issue (*Coffey* v. *United States*, 116 U. S. 436; *United States* v. *Cases of Champagne*, 9 F. (2d) 710). In the case of *Murphy* v. *United States*, 272 U. S. 630, wherein an *acquittal* under Section 21, Title II, of the National Prohibition Act on a charge of maintaining a nuisance was held not to bar a proceeding under Section 22 to abate the nuisance, it was merely held that the rule of the *Coffey case* did not apply where the subsequent proceeding was not intended to impose a penalty upon the defendant.

There is language in *United States* v. *Chouteau*, 102 U. S. 603, 610, which tends to support the contention of the respondent, but the facts of that case show that a compromise was entered into whereby the defendant paid to the Government a certain sum "in full satisfaction * * * of said indictments and prosecutions" which indictments the court found to "constitute the whole ground and

cause of the present action." (P. 610.) In other words, the parties had effected a settlement of the very offense for which the Government sought subsequently to collect the statutory penalty from the defendant's surety. Upon its facts the *Chouteau case* is clearly distinguishable.

III

PARAGRAPH 9, SECTION 701 OF THE REVENUE ACT OF 1924 IS CONSTITUTIONAL

The respondent contended in the court below that the tax imposed by Section 701 upon "Every person carrying on the business of a * * * retail liquor dealer * * * in any State * * * contrary to the laws of such State," was in effect a penalty imposed for violation of State law and therefore repugnant to the Tenth Amendment in that it encroached upon the power reserved to the States to determine the punishment to be imposed for infractions of their laws. We submit that the contention is without merit.

In the first place, the exaction in question is, as the name given it in the statutes implies, a tax. Considered as such, it can not, in view of the decision of this Court in the *License Tax Cases*, 5 Wall. 462, be held to be unconstitutional because imposed in consequence of an act which is a violation of State law. The cases cited involved the validity of indictments for violations of Acts

of Congress prohibiting any person from engaging in the business of selling lottery tickets or of retail dealing in liquor without obtaining a license from the United States and paying a special tax. It was argued on behalf of the defendants that as the sale of lottery tickets and the dealing in liquor were prohibited by State law, the legislation upon which the indictments were based was unconstitutional. In upholding the power of Congress to impose these taxes, this Court said (p. 473):

> There is nothing hostile or contradictory * * * in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

We furthermore contend that even if regarded as a penalty the "tax" here involved is not open to the constitutional objection urged by the respondent. Prior to the adoption of the Eighteenth Amendment this Court upheld the validity of the Webb-Kenyon Law (Act of March 1, 1913, c. 90, 37 Stat. 699), prohibiting the transportation in interstate commerce into any State of intoxicating liquor for purposes prohibited by the laws of such State (*Clark Distilling Co.* v. *Western Maryland*

Ry. Co., 242 U. S. 311) as well as the validity of the Reed Amendment (Act of March 3, 1917, c. 162, 39 Stat. 1058, 1069), prohibiting such transportation of intoxicating liquor into any State whose laws prohibited the manufacture or sale therein of intoxicating liquor for beverage purposes (*United States* v. *Hill*, 248 U. S. 420). Regarding the power of Congress to regulate interstate commerce, the Court in the case last cited said (p. 425): "Congress may exercise this authority in aid of the policy of the State, if it sees fit to do so."

The power conferred upon Congress by the Eighteenth Amendment to enforce its provisions by appropriate legislation may be exercised throughout the entire territorial limits of the United States and "is in no wise dependent on or affected by action or inaction on the part of the several States of the Union." *National Prohibition Cases*, 253 U. S. 350, 387. In the exercise of that power Congress may adopt any appropriate means to make the prohibition of the traffic in intoxicating liquors effective. *Everard's Breweries* v. *Day*, 265 U. S. 545, 560; *Selzman* v. *United States*, 268 U. S. 466, 468–469.

Since Congress had power to enact the Webb-Kenyon Law and the Reed Amendment in aid of the policies of States, it would seem that it likewise has power, to the same end, to further penalize the sale of liquor in States wherein such sale is prohibited.

CONCLUSION

The case was incorrectly decided below. It involves a question of sufficient general importance to justify a review by this Court. The petition for certiorari should therefore be granted.

Respectfully submitted.

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